IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs November 14, 2006

STATE OF TENNESSEE v. MARK PERRY

Direct Appeal from the Criminal Court for Sullivan County
No. S51,083 Phyllis H. Miller, Judge

No. E2006-00966-CCA-R3-CD - Filed May 21, 2007

The defendant, Mark Perry, pled guilty to selling less than 0.5 grams of cocaine, a Class C felony. Pursuant to the plea agreement, the defendant was sentenced as a Range I, standard offender to six years with the manner of service to be determined by the trial court. After a sentencing hearing, the trial court ordered the sentence be served in confinement, denying any form of alternative sentencing. The defendant now appeals. We conclude that the trial court followed the appropriate statutory procedure and imposed a lawful sentence in that the severity of the offense, the defendant's prior criminal behavior, and his lack of candor removed any presumption of an alternative sentence. We affirm the judgment from the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID H. WELLES and NORMA MCGEE OGLE, JJ., joined.

Mark D. Harris, Kingsport, Tennessee, for the appellant, Mark Perry.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Kent L. Chitwood, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant was indicted on one count of selling over 0.5 grams of a Schedule II controlled substance and one count of delivering over 0.5 grams of a Schedule II controlled substance (Class B felonies). He pled to a single, lesser charge of selling less than 0.5 grams of cocaine (a Class C felony). The six-year sentence as a Range I, standard offender was pursuant to a plea agreement with only the manner of service left to the trial court.

The following statement of proof was taken during the guilty plea hearing:

> [O]n February 15th, 2005 the Kingsport Police Department Vice Unit sent a patrol officer into the Riverview area of Kingsport, Sullivan County, Tennessee to attempt to purchase $80.00 worth of crack cocaine from anyone on the street. The officer acting in an undercover capacity met with a German Fleming, told Mr. Fleming what he needed. Mr. Fleming relayed this information to the defendant, Mr. Mark Perry. The officer purchased $80.00 worth of crack cocaine from the defendant, Mark Perry. The crack cocaine was field tested positive for cocaine, sent to the Tennessee Bureau of Investigation. It did come back positive cocaine base in the amount of 0.5 gram. The officer identified the defendant from a photo lineup stating that was in fact the person he had purchased the cocaine from. The officer also identified Mr. Fleming from a lineup stating that he was the one that orchestrated the deal. The deal was on audio and video cassette and the defendant also gave a statement saying that he had in fact sold cocaine in the past but could not remember the February 15th date in particular.

A presentence report was filed, and a sentencing hearing held. The defendant, who was the only witness to testify, explained the circumstances surrounding the offense. The defendant claimed that he found a bag containing ten to fifteen rocks of cocaine that day. That offense was the first and last time he had ever sold drugs. He only sold the crack cocaine because he knew the man who wanted to buy the drugs. The defendant admitted that a drug test taken while he was in the Navy showed he was using several kinds of drugs, including morphine and marijuana. He further admitted to placing salt in his urine test as a prank because he was not using drugs. Although the defendant was presumed to be a favorable candidate for alternative sentencing, the trial court, after considering the guilty plea, the presentence report, and the defendant's testimony found the presumption of favorableness was overcome and denied any form of alternative sentencing.

Analysis

When a criminal defendant challenges the length, range, or manner of service of a sentence imposed by a trial court, the appellate court must conduct a de novo review of the record with a presumption that the sentencing determinations made by the trial court are correct. T.C.A. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If the sentencing court did not do so, then the presumption is removed, and the appellate court must review the sentence de novo with no presumption. Id.

This court is obligated to uphold the trial court's sentencing determinations as to length and manner of service if the record reflects that the trial court followed the sentencing guidelines.

> So long as the sentencing court followed the appropriate statutory procedure and imposed a lawful sentence after giving due consideration and proper weight to the factors and principles under law, and so long as the sentencing court's findings of facts are adequately supported by the record, the [the appellate court] may not modify the sentence, even if actually preferring a different result.

State v. Goodwin, 143 S.W.3d 771, 783 (Tenn. 2004) (citing State v. Pike, 978 S.W.2d 904, 926-27 (Tenn. 1998)). Consequently, on appeal, the burden is on the defendant to show the impropriety of the sentence. T.C.A. § 40-35-401, Sentencing Commission Comments; Goodwin, 143 S.W.3d at 783.

With certain exceptions, a defendant is eligible for probation if the sentence imposed is eight years or less. T.C.A. § 40-35-303(a) (2003). For offenses committed on or after June 7, 2005, a defendant is eligible for probation if the sentence actually imposed is ten years or less. T.C.A. § 40-35-303(a) (Supp. 2005); 2005 Pub Acts, c. 353, § 7. Because the defendant in the instant case committed the act prior to June 7, 2005, he is only eligible for probation if the sentence imposed is eight years or less. T.C.A. § 40-35-303(a) (2003). Although probation must be considered, "the defendant is not automatically entitled to probation as a matter of law." T.C.A. § 40-35-303(b), Sentencing Commission Comments; State v. Fletcher, 805 S.W.2d 785, 787 (Tenn. Crim. App. 1991). Where the defendant seeks probation, the court must consider "the accused's criminal record, social history, present physical and mental condition, the circumstances of the offense, the deterrent effect upon criminal activity of the accused as well as others, and the accused's potential for rehabilitation and treatment." State v. Parker, 932 S.W.2d 945, 959 (Tenn. Crim. App. 1996).

It is clear from the defendant's brief that he wants this court to review all aspects of the trial court's rulings and to afford him relief from confinement. However, he specifically alleges that the trial court erred in applying enhancement factor number (3), that the defendant was a leader in commission of a crime involving two or more actors. T.C.A. § 40-35-114(3). We conclude the trial court was correct in applying enhancement factor (3); when the evidence showed that a co-defendant introduced the undercover officer to this defendant, it was the defendant who sold and provided the drugs and who was the leader. This issue is without merit.

Next, we conclude that the defendant has failed to meet his burden on appeal of proving the denial of alternative sentencing was improper. The presumption of being a favorable candidate for an alternative sentence was overcome by evidence to the contrary. A review of the record demonstrates that the trial court properly followed the principles of sentencing and all relevant facts and circumstances. The defendant has an extensive history of criminal behavior involving his use of drugs: he began using marijuana in 1973; he first used cocaine in 1982; and he continued his drug use until 2005. The defendant also had three convictions of driving while his license was suspended, cancelled, or revoked.

Additionally, the trial court found that the defendant's story about finding a bag of crack cocaine was unbelievable and that his story about tampering with a urine test in the Navy, even though he was not using drugs, was also unbelievable. It is well established that a "criminal defendant's rehabilitative potential is a factor to be considered in the grant or denial of probation. Candor is a relevant factor in assessing a defendant's potential for rehabilitation, see State v. Dowdy, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994), and the lack of candor militates against the grant of probation." State v. Souder, 105 S.W.3d 602, 608 (Tenn. Crim. App. 2002); see also State v. Kendrick, 10 S.W.3d 650, 656 (Tenn. Crim. App. 1999).

The trial court also found that the defendant had a poor social history and a questionable work history. The trial court stated that the defendant had been terminated from one job for violating company policy. After his termination, he worked about ten hours every other week and was paid by the job. The court also noted that a prior girlfriend of the defendant had obtained an order of protection against him. All the above are relevant considerations for the trial court and do not favor this defendant.

Conclusion

Based on the foregoing and the record as a whole, we conclude that sufficient evidence was presented to rebut the presumption of alternative sentencing.

_____

JOHN EVERETT WILLIAMS, JUDGE